

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE**

BETHANY R. SCAER and STEPHEN :
SCAER, :

Plaintiffs, :

v. :

CITY OF NASHUA, *et al.*, :

Defendants. :

Case No. 1:24-cv-00277-LM-TSM

JOINT PROPOSED DISCOVERY PLAN

DATE/PLACE OF 26(f) CONFERENCE:

October 22, 2024. Conducted via Zoom

COUNSEL PRESENT/REPRESENTING:

For Plaintiffs:

Nathan Ristuccia,
Del Kolde,
Roy McCandless

For Defendant, City of Nashua:

Steven A. Bolton,
Jonathan A. Barnes

For Defendant, Mayor James W. Donchess:

Michael A. Pignatelli,
Adam B. Pignatelli

For Defendant, Jennifer Deshaies:

Peter G. Callaghan

CASE SUMMARY

THEORY OF LIABILITY:

Count One: First Amendment Viewpoint Discrimination
Count Two: Prior Restraint
Count Three: Vagueness and Excessive Enforcement Discretion
Count Four: Overbreadth

THEORY OF DEFENSE:

In addition to the Affirmative Defenses raised by the Defendants, including, but not limited to immunity, the Defendants state that the City's 2022 Flagpole Policy complies with Supreme Court precedent set forth in Shurtleff v. City of Boston 596 U.S. 243 (2022), and clearly provides the use of the flagpole is deemed to be government speech, which is exempt from First Amendment scrutiny. Even if government speech were inapplicable, due to the fact that the flagpole in question is a nonpublic forum, the City's 2022 flagpole policy does not constitute viewpoint discrimination, does not constitute prior restraint, is not vague, and is not overbroad. The claims are moot now that the City's 2022 flagpole policy has been rescinded and citizen input is no longer permitted.

DAMAGES:

Nominal damages of \$17.91 from each Defendant to each Plaintiff.

DEMAND:

Due date: May 13, 2025

OFFER:

Due date: June 13, 2025

JURISDICTIONAL QUESTIONS:

None

QUESTIONS OF LAW:

- (1) Whether flags on Nashua's flagpole constitute government speech.
- (2) Whether Nashua discriminates between flag applicants on the basis of viewpoint, facially or as applied.
- (3) Whether Nashua's 2022 flagpole policy is an unconstitutional prior restraint
- (4) Whether Nashua's 2022 flagpole policy is unconstitutionally vague and grants excessive enforcement discretion to government officials.

- (5) Whether Nashua's 2022 flagpole policy is overbroad.
- (6) Whether this case is moot in light of Nashua's October 7, 2024 flagpole policy.
- (7) Whether the Affirmative Defenses raised by the Defendants, including, but not limited to immunity, are applicable.

TYPE OF TRIAL:

Bench trial

SCHEDULE

TRACK ASSIGNMENT:

STANDARD – 12 MONTHS

TRIAL DATE:

Two-week period beginning December 9, 2025

DISCLOSURE OF CLAIMS AGAINST UNNAMED PARTIES:

N/A.

AMENDMENT OF PLEADINGS:

Plaintiffs Due date: March 14, 2025
Defendants Due date: April 14, 2025

JOINDER OF ADDITIONAL PARTIES:

Plaintiffs Due date: March 14, 2025
Defendants Due date: April 14, 2025

THIRD-PARTY ACTIONS:

Due date: February 14, 2025

MOTIONS TO DISMISS:

Due date: February 13, 2025

DATES OF DISCLOSURE OF EXPERTS AND EXPERTS' WRITTEN REPORTS AND SUPPLEMENTATIONS:

Plaintiffs: February 3, 2025

Defendants: April 4, 2025

COMPLETION OF DISCOVERY:

- (1) Date all discovery complete: June 17, 2025
- (2) Date for early discovery: No early discovery.

MOTIONS FOR SUMMARY JUDGMENT:

Due date: July 17, 2025

CHALLENGES TO EXPERT TESTIMONY:

60 days prior to trial

DISCOVERY

DISCOVERY NEEDED:

- (1) Discovery into the history of Nashua's flagpole.
- (2) Discovery into applications to use the flagpole since 2017, including both applications denied and applications approved.
- (3) Discovery into Nashua's flagpole policies and their revisions over time.
- (4) Discovery into the Scaers' flag applications and their denial.
- (5) Discovery into Nashua's City Plaza Events policy and applications approved and denied under it.
- (6) Discovery into the Scaers' coordination with other individuals and/or organizations regarding their applications for raising flags at Nashua City Hall.

MANDATORY DISCLOSURES (Fed. R. Civ. P. 26(a)(1)):

Parties will complete mandatory disclosures in the form set forth in Fed. R. Civ. P. 26(a)(1) by January 10, 2024.

INTERROGATORIES:

A maximum of 25 interrogatories by each party to any other party. Responses due 30 days after service unless otherwise agreed to pursuant to Fed. R. Civ. P. 29.

REQUESTS FOR ADMISSION:

A maximum of 25 requests for admission by each party to any other party. Responses due 30 days after service unless otherwise agreed to pursuant to Fed. R. Civ. P. 29.

DEPOSITIONS:

A maximum of 7 depositions by plaintiff(s) and 7 by defendant(s). Each deposition limited to a maximum of 7 hours unless extended by agreement of the parties.

ELECTRONIC INFORMATION DISCLOSURES (Fed. R. Civ. P. 26(f)):

Parties do not anticipate extensive discovery of ESI but agree to preserve all electronic communications, including, but not limited to e-mails and text messages, concerning Nashua flagpole policy and applications to use the flagpole. Plaintiffs specifically asked that text messages and other ephemeral communications sent from personal devices be preserved. Parties agree to identify search words for searches and to produce ESI electronically in native format or PDF format whenever possible. If privileged or trial preparation materials are inadvertently disclosed, parties will return materials promptly on request.

STIPULATION REGARDING CLAIMS OF PRIVILEGE/PROTECTION OF TRIAL PREPARATION MATERIALS (Fed. R. Civ. P. 26(f)):

The Parties agree to comply with FRCP 26(b)(5) with respect to claims of privilege, privilege logs, protection of trial preparation materials, and inadvertent disclosures.

The parties propose that the production of privileged or work-product protected documents, electronically stored information (ESI), or other information, whether inadvertent or otherwise, is not a waiver of the privilege or protection from discovery in this case or in any other federal or state proceeding. This provision shall be interpreted to provide the maximum protection allowed by Federal Rule of Evidence 502(d).

The parties propose that in the event a disclosing party inadvertently produces privileged materials, it will notify the requesting party of such disclosure as soon as it becomes aware of the inadvertent production. After the requesting party is so notified, it will return, sequester, or destroy all information and copies and will not disclose or use the information in the course of the litigation until the claim of privilege or protection as to trial preparation materials is resolved. The parties further propose that they will attempt to resolve disputes regarding the assertion of privilege between themselves. If they are unable to do so, the parties will file a motion with the Court for in camera review and a decision on the issue.

Nothing in this paragraph relieves the parties of their obligations under Rule 4.4(b) of the Rules of Professional Conduct for New Hampshire.

OTHER ITEMS

SETTLEMENT POSSIBILITIES:

This cannot be evaluated prior to the Court's decision on the motion for preliminary injunction.

JOINT STATEMENT RE: MEDIATION:

The parties do not plan to pursue mediation.

TRIAL ESTIMATE:

2 days

WITNESSES AND EXHIBITS:

As set forth in LR 16.2, the due dates are as follows:

- (1) Witness and exhibit lists, included in final pretrial statements, are due 10 days before final pretrial conference but not less than 30 days before trial.
- (2) Objections are due 14 days after filing of final pretrial statements.

PRELIMINARY PRETRIAL CONFERENCE:

The parties *do not request* a preliminary pretrial conference with the court before entry of the scheduling order.

OTHER MATTERS:

The parties agree to not begin discovery until after January 2, 2025 in order to give the Court time to decide Plaintiffs' motion for preliminary injunction and any report and recommendation resulting from that motion. The parties jointly request that the pretrial conference set for November 21, 2024 be stricken.

Dated: October 24, 2024

Respectfully submitted,

/s/ Roy S. McCandless

Roy S. McCandless
New Hampshire Bar No. 11850
ROY S. MCCANDLESS, ESQ., PLLC 125
North State Street
Concord, New Hampshire 03301
Tel: (603) 841-3671, Ext. 101
Fax: (603) 513-2799
roysmccandless@gmail.com

/s/ Nathan J. Ristuccia

Nathan J. Ristuccia*[†]
Virginia Bar No. 98372
Endel Kolde*
Washington Bar No. 25155
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., NW
Suite 801
Washington, D.C. 20036
Tel: (202) 301-3300
Fax: (202) 301-3399
nristuccia@ifs.org
dkolde@ifs.org

**Pro hac vice*

Counsel for Plaintiffs

City of Nashua, Defendant
By its attorneys,

James W. Donchess
By his attorneys

/s/ Jonathan A. Barnes

Steven A. Bolton, Esq. (NH Bar #67)
Celia K. Leonard, Esq. (NH Bar #14574)
Jonathan A. Barnes, Esq. (NH Bar #20061)
City of Nashua
Office of Corporation Counsel
229 Main Street, P.O. Box 2019
Nashua, NH 03061-2019
(603) 589-3250
boltons@nashuanh.gov
leonardc@nashuanh.gov
barnesj@nashuanh.gov

/s/ Michael A. Pignatelli

Michael A. Pignatelli (NH Bar #2026)
Adam B. Pignatelli (NH Bar #20211)
Rath, Young, and Pignatelli, P.C.
20 Trafalgar Square, Suite 307
Nashua, NH 02063
(603) 889-9952
map@rathlaw.com
abp@rathlaw.com

[†] Not a D.C. Bar Member but providing legal services in the District of Columbia exclusively before federal courts, as authorized by D.C. Ct. App. R. 49(c)(3).

Jennifer L. Deshaies, Defendant
By her attorneys,

/s/ Peter G. Callaghan

Peter G. Callaghan, Esq. (NH Bar #6811)

Kat Mail, Esq. (NH Bar #274914)

Preti Flaherty, PLLP

P.O. Box 1318

Concord, NH 03302-1318

(603) 410-1500

pcallaghan@preti.com

kmail@preti.com